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No. 82-727

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

MUSTANG TRANSPORTATION COMPANY, HENRY CROWDER, AND CANAL INSURANCE COMPANY,
Petitioners

v.

RYDER TRUCK LINES, INC., AND LIBERTY MUTUAL INSURANCE COMPANY,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Does the "control and responsibility" requirement of the Interstate Commerce Commission's Equipment Leasing Regulation, 49 C.F.R. §1057.4(a)(4), insulate a lessor from liability for the conduct of the operator of a leased tractor/trailer where, under the terms of the Lease Agreement, the lessor agrees to indemnify the lessee for all losses sustained by the lessee resulting from the use of the leased equipment, and where the lessee's liability to the public and shippers is not an issue?

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BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Ryder Truck Lines, Inc., and Liberty Mutual Insurance Company[1] respectfully oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on July 29, 1982.

OPINION BELOW

The Opinion of the United States District Court for the Eastern District of Pennsylvania in *Mustang Transportation Company v. Ryder Truck Lines, Inc.*, is reported at 523 F.Supp 1097 (E.D. Pa. 1981). The District Court entered judgment in favor of the defendants and against the plaintiffs. The decision of the District Court was affirmed, without Opinion, by the United States Court of Appeals for the Third Circuit on July 29, 1982.

JURISDICTION

This Brief in Opposition to the Petition for Writ of Certiorari is being filed within the prescribed thirty (30) day period following October 27, 1982. Jurisdiction of this Court has been invoked by Petitioners under 28 U.S.C. §1254(1) 1976.

REGULATION INVOLVED

The Interstate Commerce Commission (ICC) Regulation at issue, 49 C.F.R. §1057.4(a)(4), has been revised and codified in 49 C.F.R. §1057.12(d). Both have been reproduced in the Appendix to the Petition for Writ of Certiorari (App. 22a).

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1. Neither of the corporate respondents is related to a company whose listing is required by Rule 28.1 of the Rules of the Supreme Court of the United States.

COUNTERSTATEMENT OF THE CASE

This suit was brought to resolve questions of liability and insurance coverage arising out of an accident involving a tractor/trailer and an automobile which occurred on December 7, 1969, in Juniata County, Pennsylvania. The tractor/trailer was operated by Henry Crowder ("Crowder"). Crowder owned the tractor; Mustang Transportation Company ("Mustang") owned the trailer. The automobile with which the tractor/trailer collided was owned and operated by Charles A. Benedict ("Benedict"). Daniel Mattia ("Mattia") and Edward A. Renzi ("Renzi") were riding in the automobile as passengers. Renzi was killed; Benedict and Mattia were injured. At the time of the accident the tractor/trailer was being operated under a One-Way Lease Agreement between Crowder and Mustang, as lessors, and Ryder Truck Lines, Inc. ("Ryder"), as lessee.

Separate actions were started in the United States District Court for the Eastern District of Pennsylvania to recover damages sustained in the accident. Marie Renzi, Administratrix of the Estate of Edward A. Renzi, deceased, brought suit against R.L. Dease ("Dease"), Vice President and Secretary of Mustang, Crowder and Mustang. Ryder was joined as a third party defendant in that suit. Benedict and Mattia brought a separate suit against Crowder and Dease to which Ryder was not a party. The two cases were consolidated for trial before the Honorable Clifford Scott Green and were then settled for $117,500.00. Canal Insurance Company ("Canal"), Mustang's insurer, and Liberty Mutual Insurance Company ("Liberty Mutual"), the insurer of Ryder, each agreed to contribute one-half of the settlement fund and to litigate in a separate proceeding questions relating to insurance coverage and liability of the lessors and lessee.

The within action was brought by Mustang, Dease, Crowder and Canal against Ryder and Liberty Mutual, claiming that Ryder and Liberty Mutual owed the entire

settlement proceeds. Ryder and Liberty Mutual filed a Counterclaim in which they set forth their position that Mustang, Dease, Crowder and Canal owed the entire proceeds of settlement. The jurisdiction of the District Court was based upon diversity of citizenship of the parties. 28 U.S.C. §1332(a)(1)(1976).

For purposes of determining the issues of liability and insurance coverage the parties stipulated that Crowder's acts or omissions were the proximate cause of the injuries and damages allegedly sustained by the plaintiffs in the underlying suits. The stipulation also provided as follows:

The One-Way Lease Agreement was executed on December 6, 1969, by Crowder, on his behalf and on behalf of Mustang as lessors, and by Ryder, as lessee. At that time, Crowder's tractor was under a long term indefinite lease to Mustang for approximately 75-80% of his work. The lease to Ryder covered a single trip to Michigan and was entered into by Crowder, on behalf of Mustang, as was Mustang's practice, so as to avoid returning to Mustang's place of business, Atlanta, Georgia, with an empty trailer.

The Lease contained an indemnity provision in which Crowder and Mustang, lessors, agreed to indemnify Ryder, lessee, for all losses sustained by Ryder resulting from the use of the tractor/trailer. That clause reads as follows:

> It is agreed that Lessor [Mustang and Crowder] will carry acceptable Public Liability and Property Damage Insurance. Lessor [Mustang and Crowder] agrees to reimburse and otherwise indemnify Lessee [Ryder] for any and all losses sustained by Lessee [Ryder] resulting from the use of the aforesaid equipment. (Brackets added.)

By order dated September 28, 1981, the Honorable Clifford Scott Green, sitting without a jury, granted judgment in favor of the defendants, Ryder and Liberty

Mutual, on the claims of Mustang, Dease, Crowder and Canal. Liberty Mutual and Ryder were also awarded $58,750.00, the amount claimed on their Counterclaim against Mustang, Crowder and Canal.

The findings of the Lower Court may be summarized as follows:

First, the Court held that Crowder was Mustang's agent at the time of the accident, whereas the relationship of Ryder and Crowder was that of principal and independent contractor. 523 F.Supp. 1102, Appendix to the Petition, 4a-11a.

Second, the Court found that the indemnity agreement in the One Way Lease Agreement, in which Crowder and Mustang, lessors, agreed to indemnify Ryder, lessee, for all losses sustained by Ryder resulting from the use of the tractor/trailer, was valid and enforceable in accordance with this Court's ruling in *TransAmerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975). *Id.* 1104, Appendix, 12a-13a.

Third, the District Court held that the "Truckmen's Endorsement" in the Liberty Mutual policy, extending coverage to a leased vehicle in certain situations, did not apply in the within case because Canal's policy did not contain reciprocal coverage for the vehicles Mustang leased from other trucking companies. *Id.* 1106-07, Appendix, 14a-18a.

Fourth, because the District Court found that Mustang was the sole employer of Crowder at the time of the accident, and in view of the stipulation that Crowder was the primary tortfeasor, the District Court held that Ryder was not liable for contribution or indemnity. The plaintiffs, Mustang, Dease, Crowder and Canal, conceded that, if Crowder were the sole employee of Mustang, Ryder would not be liable for contribution or indemnity. *Id.* 1107, Appendix 18a-19a.

Lastly, because the District Court found that Mustang was the sole employer of Crowder, the District

Court found that the Gross Receipts Endorsement in Mustang's insurance policy provided coverage for the accident, including the Counterclaim of Ryder and Liberty Mutual. *Id.* 1107, *Appendix*, 19a.

Mustang, Crowder and Canal sought review of the District Court's Opinion in the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. §1291 (1976). On July 29, 1982, the Third Circuit entered an Order affirming, without Opinion, the District Court's judgment.

REASONS FOR DENYING A WRIT OF CERTIORARI

It is the position of the respondents that this case is not one which requires the exercise of this Court's extraordinary and discretionary jurisdiction. The decision of the District Court, as affirmed by the United States Court of Appeals for the Third Circuit, was correct and in accordance with this Court's recent decision in *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28 (1975).

Petitioners argue that certiorari should be granted because the case involves a significant federal question, the interpretation of an Interstate Commerce Commission Regulation, 49 C.F.R. §1057.4(a)(4), and conflicts with the decisions of Courts of Appeals for the Fifth and Seventh Circuits and the Supreme Courts of Georgia, Illinois and Maine. That position is incorrect and completely disregards the real issues in this case.

The District Court, as affirmed by the Third Circuit, beginning at page 11a of the Appendix to the Petition, correctly held that 49 C.F.R. §1057.4(a)(4) is totally inapplicable to the present case because the liability of Ryder, the lessee, to members of the public and to shippers who were damaged by Crowder's negligence, was not an issue in the case. Rather, as Judge Green said, the question before the Court was how financial liability for the accident was to be divided ultimately among the lessors and the lessee and their insurers who are not protected by the ICC regulations.

The ICC regulations require that Ryder, as lessee, assume exclusive possession, control and use of the tractor/trailer as well as full responsibility for its operation. The lease with Ryder complied in all respects with such regulations. The pertinent part of the Lease provided as follows:

> It is understood that the lease equipment under this agreement is in the exclusive possession, control,

> and use of the authorized carrier Lessee [Ryder] and that the Lessee [Ryder] assumes full responsibility in respect to the equipment it is operating to the public, the shippers, and the Interstate Commerce Commission. (Brackets added.)

The District Court correctly held that the ICC regulations do not prohibit a lessor and a lessee from agreeing between themselves to allocate financial risk in a certain manner and that is what was done in this case in the One-Way Lease Agreement. Under the terms of the Lease, Mustang and Crowder, lessors, were required to indemnify Ryder, lessee, for all losses resulting from the use of the leased equipment. In upholding the indemnity agreement the District Court relied upon this Court's recent decision in *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc., supra,* in which this Court held that the ICC regulations do not prohibit an indemnification provision in a lease agreement between the lessor and the lessee, where, as in this case, the lessee does not absolve itself from the duty to the public and to shippers imposed upon it by the Commission's regulations. 423 U.S. at 39-41. The following language, at 41, is particularly pertinent:

> *An indemnification provision with respect to the lessor's negligence does not necessarily tend to lessen operational safety. On the contrary, it may increase it.* The lessor, as a general rule, is the party more familiar with the equipment it leases and with the experience, ability and record of the driver it furnishes. Any agreement placing the ultimate financial responsibility upon the negligent lessor thus may have a tendency to provide greater protection to the public and to shippers. (Emphasis added.)

Moreover, at least four Courts of Appeals, including the Third Circuit, have held that indemnification clauses in one-way lease agreements, similar to the one involved in the within matter are valid and do not violate

the ICC regulations. *Carolina Casualty Insurance Company v. Insurance Company of North America*, 595 F.2d 128, 130 (3rd Cir. 1979); *Carolina Casualty Insurance Company v. Underwriters Insurance Company*, 569 F.2d 304, 313 (5th Cir. 1978); *Jones Truck Lines Inc. v. Ryder Truck Lines, Inc.*, 507 F.2d 100, 102 (6th Cir. 1974); *Carolina Freight Carriers Corp. v. Ritt County Transportation Co.*, 492 F.2d 243, 246 (4th Cir. 1974); *Allstate Insurance Company v. Alterman Transport Lines, Inc.*, 465 F.2d 710, 713 (5th Cir. 1972); *Vance Trucking Co. v. Canal Insurance Co.*, 249 F.Supp. 33, 39, *aff'd* 395 F.2d 391 (4th Cir.), *cert. denied* 393 U.S. 845 (1968); *Allstate Insurance Company v. Liberty Mutual Insurance Co.*, 368 F.2d 121, 125 (3rd Cir. 1966).

Only one Court of Appeals, in a case upon which petitioners rely, found such indemnity provisions to be contrary to public policy. *See Alford v. Major*, 470 F.2d 132 (7th Cir. 1972). That case was overruled by *Transamerican Freight Lines, Inc.* in which this Court reversed a decision of the Court of Appeals for the Seventh Circuit that had followed *Alford v. Major*. 423 U.S. at 33-34. Therefore, the decision of the District Court in the instant case, cannot be considered in conflict with the Court of Appeals for the Seventh Circuit.

The main argument of the petitioners beginning at page 6 of the Petition is that, until the Opinion of the District Court in this case, Lower Courts have held a vehicle lessee liable to the public and to shippers as a matter of law under 49 C.F.R. §1057.4(a)(4), and that Judge Green's opinion was to the contrary. *See Simmons v. King*, 478 F.2d 857 (5th Cir. 1973); *Cosmopolitan Mutual Insurance Company v. White*, 336 F.Supp. 92 (D. Del. 1972); *Farmer v. Ryder Truck Lines, Inc.*, 245 Ga. 734, 266 S.E.2d 922, *cert. denied*, 449 U.S. 885 (1980); *Schedler v. Rowley Interstate Transportation Co.*, 68 Ill.2d 7, 368 N.E.2d 1287 (1977); *Weeks v. Kelley*, 377 A.2d 444 (Me. 1977). That simply is not what the District Court decided in this case because that issue was

not before the court. Moreover, none of those cases dealt with tractor/trailer leases with indemnity provisions; they dealt only with the requirement of the ICC Regulation, §1057.4(a)(4) that the lessee assume "full responsibility . . . to the public".

As stated in the District Court Opinion beginning at page 18a of the Appendix, the stipulation of the parties under which the within case was tried provided that the ultimate liability of Ryder was to be determined on the basis of the pleadings in the underlying actions, that is, that Ryder was not named as a party in one of the underlying actions and was only a third-party defendant in the other. Therefore, because plaintiffs in the underlying actions never had a direct claim against Ryder, the District Court never considered the question whether Ryder should be found liable to the public as a matter of law and, instead, concluded that it was concerned only about how financial liability for the accident was to be divided among the lessors and the lessee and their insurers under the terms of the Lease Agreement and the pertinent facts.

The District Court correctly pointed out in its Opinion at page 19a of the Appendix that, because Ryder was not named as a direct defendant in the underlying cases, it could only be liable to the original defendants, Mustang and Crowder, for contribution in the Renzi case in which it was named a third-party defendant. Further, Ryder could be found liable for contribution only if it were determined that Mustang and Ryder were joint employers of Crowder, again because Ryder was not named a direct defendant. On that issue, the District Court held, applying state law, that under the terms of the lease between Mustang and Crowder, Mustang exercised such control over Crowder that it, Mustang, was Crowder's sole master or employer at the time of the accident. That part of the District Court Opinion involved only an interpretation of the lease between Mustang and

Crowder, and in no way can be said to impact on the question of Ryder's liability to the public.

The cases cited by petitioners, among them *Cosmopolitan Mutual Insurance Company v. White*, are not to the contrary. Although such cases stated that an ICC carrier's liability for equipment and driver is not governed by traditional common law doctrines of master-servant relationships and respondeat superior, those cases involved the public or shippers and were not concerned with the issue in this case — how financial liability for the accident was to be divided ultimately among the lessors and the lessee and their insurers.

Petitioners state at page 9 of the Petition that once the District Court determined that the vehicle operator was not an insured individual under the terms of either policy, it had to decide the question of the trucker's ultimate responsibility to the public. That statement is incorrect. First of all, the Court decided that the policy of Liberty Mutual, the lessee's insurer, provided no coverage because of the absence of reciprocity. Appendix to the Petition, 14a-18a. Secondly, the Court did not determine that there was no coverage under the policy of Canal, the lessor's insurer, for Crowder — it never reached that issue. The District Court simply stated petitioners conceded that if the Court were to find Mustang, the lessor, was the sole employee of Crowder at the time of the accident, there would be coverage for the accident under Mustang's insurance policy. Appendix to the Petition, 19a.

It is also significant that nothing in any of the cases cited by the petitioners suggests that the ICC regulations automatically protect the lessor from liability under state law concepts of vicarious liability or contractual liability under an indemnification agreement in a lease. In fact, *Simmons v. King*, the Fifth Circuit case upon which petitioners place great reliance, concluded that:

> [A]lthough [the lessee] is liable for [the driver's] acts as a matter of law, [the lessor] could still be like-

> wise liable under applicable common [law] . . . standards . . . . This is not as incongruous as might be supposed. ICC can mandate a positive legal responsibility which we uphold in the only way it would be meaningful — to give protection to the injured member of the public. *At the same time [the lessor] has, or may have, a practical control over [the driver] of a kind which would not allow it to obtain an automatic insulation from liability from the mere terms of a lease between two parties.* (Emphasis added and brackets added.)

478 F.2d at 867. The case was remanded to the District Court for a new trial on that issue.

In *Weeks v. Kelley*, another case cited by petitioners, the Supreme Court of Maine recognized that this Court, in *Transamerican Freight Lines, Inc.*, upheld an indemnification agreement in a tractor/trailer lease and then noted that *only "in the absence of any indemnification agreement in the lease providing otherwise*, the lessee remains contractually (as well as statutorily) responsible for injuries sustained by the travelling public as a result of the negligent operation of the equipment." (Emphasis added.) 377 A.2d 444, 447. Likewise, because of the indemnity agreement in the present case, as between lessor and lessee, the regulations providing for "full responsibility" in the lessee are inapplicable.

It follows therefore that the decision of the District Court, as affirmed by the United States Court of Appeals for the Third Circuit, was entirely correct and in accordance with this Court's decision in *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.* and does not conflict with any other decisions. Of equal importance, the decision does not in any way upset the regulatory scheme embodied in the ICC regulations because this case did not, in any way, involve a lessee's liability to members of the public or to shippers. The sole and only proposition for which the present case stands is

that the ICC regulations do not prohibit a lessor and a lessee from agreeing between themselves to allocate financial risk by way of an indemnity provision in a lease agreement.

CONCLUSION

For all above reasons, the Petition for Writ of Certiorari should not be granted.

RESPECTFULLY SUBMITTED,

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